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# Trade Marks and Trade Names and Unfair Competition - Constitutioality of the Fair Trade Acts

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## COMMENT

### TRADE MARKS AND TRADE NAMES AND UNFAIR COMPETITION—CONSTITUTIONALITY OF THE FAIR TRADE ACTS.

TWO RECENT cases in courts of record have raised the question of whether or not resale price maintenance—as embodied in the "Fair Trade Acts"—is again to be seriously impeded by constitutional and other legal barriers.[1] This conflict has now been waged in the courts of the United States for a period extending well over half a century. The North Dakota Fair Trade Law is patterned on the California model and was adopted in 1937.[2] Its constitutionality has not yet been tested.

### RESALE PRICE MAINTENANCE IN THE UNITED STATES PRIOR TO FAIR TRADE ACTS

Prior to the passage of the Sherman Act, cases coming before the federal courts had determined that resale price agreements would be an acceptable method of merchandising. In *Fowle v. Parke*[3] the Supreme Court of the United States held it to be no defense that a contract contained an agreement that one of the parties would sell only at specified prices and that such a contract was enforceable despite the fact that it might have been restraint of trade at common law. The court cited *Rousillon v. Rousillon*[4] which had declared contracts containing partial restraints of trade to be enforceable provided

[1] Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371 (Fla. 1949); Levine v. O'Connell, 275 App. Div. 217, 88 N.Y.S.2d 672 (1949).

[2] N. DAK. REV. CODE (1943) c. 51-11; CAL. BUS. & PROF. CODE §§16900-16905 (Deering, 1941). Although Fair Trade Laws and Unfair Trade Practice Laws are, in a sense, complementary, they serve different purposes. Whereas the Fair Trade Law governs vertical price relations, the Unfair Practices Law operates horizontally. Grether, *Experience in California With Fair Trade Legislation Restricting Price Cutting*, 24 CALIF. L. REV. 640 (1936). "Resale price maintenance as now practiced in intrastate commerce in 44 (45) states of the United States and in interstate commerce . . . is a system of pricing a trademarked, branded, or otherwise identified product for resale . . . Pursuant to laws legalizing such arrangements, the manufacturer . . . prescribes by contract the minimum price at which such product may be sold at wholesale "or at" retail in a specified state, or in a specified portion thereof, with the effect of legally binding all other distributors in the specified area to conform to such price. This is done by entering into a contract with at least one such distributor of such product and serving proper notice upon all other distributors who are thereupon obligated to maintain the minimum price named in the contract." FTC, REPORT ON RESALE PRICE MAINTENANCE 4-5 (1945).

[3] 131 U. S. 88 (1889).

[4] 14 Ch. D. 351 (1880).

the partial restraint was reasonable. In the same year, a lower federal court held in *Bowling v. Taylor*[5] that the defendant could not avoid suit based on his breach of an agreement not to manufacture a certain type of merchandise on the ground the contract contained a resale price maintenance agreement. In 1892, in a prosecution under the Sherman Act where the defendant had contracted to pay a rebate to dealers maintaining prices, the court found that such a system was a reasonable restraint of trade in the defendant's business.[6] By way of *dicta* the court added that even if the dealer had required resale price agreements instead of offering rebates, he would not have been guilty of an unlawful restraint of trade under the facts presented.[7]

Ten years later the courts found that the right to maintain prices was incidental to the right to vend granted by patent laws to a patentee and that control of resale prices under a license to manufacture was therefore not in restraint of trade and thus void under the Sherman Act.[8] The same was not true under the copyright law. One who cut prices in violation of notices on copyrighted books could not be held liable as an infringer[9] and in *Bobbs-Merrill Co. v. Straus*[10] the court distinguished between infringement of a copyright and a patent, saying that the protection afforded by statute to a patentee was broader than that afforded the holder of a copyright. However, a contract to maintain prices between a copyright holder and his distributor was enforceable.[11] In several cases[12] strangers to price maintenance contracts were restrained from inducing a breach of the agreement and in one instance the distributors with whom the contract was made and those aiding them were held liable for violation of the price fixing agreement.[13]

In the first case to suggest that patentees were not entitled to special privileges in regard to resale price maintenance,

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[5] 40 Fed. 404 (C. C. Conn. 1889).
[6] *In re* Green, 52 Fed. 104 (C.C.S.D. Ohio 1892).
[7] *Id.* at 118.
[8] Bement v. National Harrow Co., 186 U.S. 70 (1902).
[9] Bobbs-Merrill Co. v. Snellenburg, 131 Fed. 530 (C.C.E.D. Pa. 1904).
[10] 210 U. S. 339; Scribner v. Straus, 210 U. S. 352 (1908).
[11] Authors' and Newspapers' Ass'n v. O'Gorman Co., 147 Fed. 616 (C.C.R.I. 1906).
[12] Dr. Miles Medical Co. v. Platt, 142 Fed. 606 (C.C.N.D. Ill. 1906); Wells & Richardson v. Abraham, 146 Fed. 190 (C.C.E.D.N.Y. 1906); Dr. Miles Medical Co. v. Jaynes Drug Co., 149 Fed. 838 (C.C. Mass. 1906).
[13] *In re* Park, 138 Fed. 421 (C.C.S.D. Ohio 1905).

and that such a right—if it existed—was derived solely from the common law, the United States Court of Appeals for the Sixth Circuit found in *J. D. Park & Sons v. Hartman*[14] that the system of contracts to fix retail prices was an unreasonable restraint of trade under the common law and under the Sherman Act. It was this decision which furnished the precedent for the decision in *Dr. Miles Medical Co. v. Park Sons & Co.*[15] in which the Supreme Court said with regard to the resale price arrangement, ". . . complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes. It is an article of commerce and the rules concerning the freedom of trade must be held to apply to it. . . . The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantages may be derived from competition in the subsequent traffic."[16]

In the year of the *Miles Medical Company* decision, three cases subjected price cutting sub-purchasers to restraining injunctions by virtue of notices posted on patented articles which specified the retail price.[17] When the courts held that attempts to control resale prices by notices attached to the patented article were illegal under the Sherman Act,[18] the Victor Talking Machine Company undertook to devise a means of maintaining prices which would be within the rules laid down by the courts. The system of first licensing dealers and then attaching notices restricting the use of the articles rather than the right to vend was employed, the theory being that even if the royalties were paid in a lump sum, the title would be retained and the resale price would actually be controlled as in an agency relationship. In 1917, this device was held to be a mere subterfuge, the title passing to the purchaser on payment of the lumped royalties.[19] The same court declared resale price contracts on patented goods to be illegal and beyond the patent monopoly one year later.[20] Yet resale price

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[14] 153 Fed. 24 (6th Cir. 1907).

[15] 220 U. S. 373 (1911).

[16] *Id.* at 408.

[17] Automatic-Pencil Sharpener Co. v. Goldsmith Bros., 190 Fed. 205 (C.C.S.D. N.Y. 1911); Thos. A. Edison v. Smith Mercantile Co., 188 Fed. 925 (C.C.W.D. Mich. 1911); Waltham Watch Co. v. Keene, 191 Fed. 855 (C.C.S.D.N.Y. 1911), *rev'd.*, 202 Fed. 225 D.C.N.Y. (1913), *cert. denied*, 232 U.S. 724 (1914).

[18] United States v. Keystone Watch Case Company, 218 Fed. (502) (D.C.E.D. Pa. 1915).

[19] Straus v. Victor Talking Machine Co., 243 U. S. 490 (1917).

[20] Boston Store v. American Gramaphone Co., 246 U. S. 8 (1918).

contracts for patented goods were enforced when an agency relationship existed.[21]

Other companies devised systems whereby the manufacturer would refuse to sell to price cutters and thus maintain prices, a practice approved in two decisions.[22] This was one of the last resale price maintenance systems to be attacked in the courts prior to the enactment of fair trade legislation. The Federal Trade Commission issued cease and desist orders against such practices as making lists of price cutters, the use of agents to investigate instances of price cutting, and the reporting of names of price cutters to wholesale dealers so as to prevent dealing with them.[23] These orders issued under the Federal Trade Commission Act[24] were sustained with slight modification[25] and in effect permitted the manufacturer to refuse to sell but did not permit identification of price cutters systematically so as to make the refusals to sell effective.

## ENACTMENT AND COURT TEST OF FAIR TRADE LEGISLATION

Another avenue to effective resale price maintenance lay in the field of legislation with court enforcement of the laws against offenders. As early as 1913 New Jersey enacted a law having some of the elements of the present fair trade laws.[26] But it was not until 1931, when California enacted its fair trade law,[27] that the laws as they are now known came into being. The California Act, as amended in 1933,[28] became the model for similar laws rapidly adopted in other states,[29] although prior to the Miller-Tydings Amendment to the Sher-

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[21] United States v. General Electric Co., 272 U.S. 476 (1926).

[22] United States v. Colgate & Co., 250 U.S. 300 (1919); United States v. Schrader's Son, 252 U.S. 85, 97, (1920).

[23] SELIGMAN AND LOVE, PRICE CUTTING AND PRICE MAINTENANCE 73 n. 14 (1932).

[24] 38 Stat. 719 (1914), 15 U.S.C. § 45 (1940).

[25] See, E.G., FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); Hill Brothers v. FTC, 9 F. 2d 481 (9th Cir. 1926).

[26] N.J. Rev. Stat. 56:4-1 and 2 (1937).

[27] Cal. Bus. & Prof. Code §§16900-16905 (Deering, 1941).

[28] Cal. Stat. 1933, p. 793. This amendment declared that selling, or advertising for sale, at prices lower than those specified, by persons, whether parties to the resale contract or not, was unfair competition and actionable at the suit of any person damaged.

[29] As of May 1, 1941, 45 states adopted some form of resale price maintenance legislation. Only Missouri, Texas, Vermont, and the District of Columbia did not do so. FTC, REPORT ON RESALE PRICE MAINTENANCE xxvii (1945). "The statutes fall, roughly, into two broad categories: (a) the "old type" acts, which are patterned upon the pioneer California statute and (b) the "new type" acts, which are based upon the model law drafted by the National Association of Retail Druggists in 1937." Notes and Legislation, *Resale Price Maintenance: The Fair Trade Acts in Operation*, 52 Harv. L. Rev. 284, 285, (1938).

man Act[30] the various state fair trade laws were in conflict with federal antitrust legislation if applied to interstate commerce.[31]

The Illinois Act was sustained by the Illinois Supreme Court in two instances[32] and on appeal to the United States Supreme Court where the two cases were heard together, the court decided in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*,[33] (1) that the act did not infringe the doctrine of previous decisions dealing with legislative price fixing since the Illinois Act did not fix prices, (2) that there was no violation of the due process clause of the Fourteenth Amendment, (3) that the act was not arbitrary, unfair, or unreasonable, (4) that the buyer of trademarked goods could sell the commodity at his own price under the act provided he do so without using the goodwill as an aid, (5) that the act did not deny the equal protection of the laws in violation of the Fourteenth Amendment by conferring a privilege on producers and owners of trademarked goods, and (6) that the phrases used in the act were sufficiently definite so as not to mislead by their meaning.[34]

In New York, the fair trade law was first found to be unconstitutional as applied to a merchant's sale of commodities under a trademark or copyright on the ground that the state could not fix prices where such articles were not affected with the public interest.[35] After the *Old Dearborn* decision these cases were overruled,[36] the court saying that it had believed the New York law to be a clear case of unauthorized restriction upon the disposition of property, and that therefore it was unconstitutional within the rules of former decisions of

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[30] 50 Stat. 693 (1937), 15 U.S.C. §1 (1940).

[31] Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912); Dr .Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911).

[32] Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 363 Ill. 610, 2 N.E. 2d 940 (1936); Joseph-Triner Corp. v. McNeil, 363 Ill. 559, 2 N.E. 2d 929 (1936).

[33] 299 U.S. 183 (1936).

[34] The California Act was similarly upheld in Max Factor & Co. v. Kunsman, 5 Cal. 2d 446, 55 P. 2d 177; Pyroil Sales Co. v. Pep Boys, 5 Cal. 2d 784, 55 P. 2d 194 (1936), *aff'd*, 299 U.S. 198 (1936).

[35] Doubleday Doran & Co. v. R. H. Macy & Co., 269 N.Y. 272, 199 N.E. 409; Seeck & Kade, Inc. v. Tomshinsky, 269 N.Y. 613, 200 N.E. 23 (1936). New Jersey likewise found its act unconstitutional. Johnson & Johnson v. Weissbard, 120 N.J. Eq. 314, 184 Atl. 783 (1936). But this was reversed in light of the *Old Dearborn* decision. Johnson & Johnson v. Weissbard, 121 N.J. Eq. 585, 191 Atl. 873 (1937).

[36] Bourjois Sales Corp v. Dorfman, 273 N.Y. 167, 7 N.E. 2d 30 (1937).

the United States Supreme Court.[37] The New York court then bowed to the Supreme Court's interpretation of its own decisions.[38]

The Florida court in its most recent decision, while recognizing the overwhelming precedent to the contrary, took the view that the Florida Act went beyond the scope of the police power and was arbitrary and unreasonable in favoring one economic group over another when the general welfare was not to be served under the current economic conditions.[39] The court followed precedent laid down in decisions in which the United States Supreme Court had held, (1) that legislative price fixing is unconstitutional unless the business or property is affected with a public interest, and (2) that legislative restrictions upon the right of a private dealer to fix his own prices infringe the liberty of contract and is a taking of his property without due process under the Fourteenth Amendment.[40] The Supreme Court in the *Old Dearborn case* did not apply the rule of these cases when the court found that the Illinois Act did not fix prices, nor did it delegate such power to private persons.[41]

## ECONOMIC ASPECTS OF FAIR TRADE LEGISLATION

There are ends other than that of protecting the consumer to be considered[42] but the primary aim of resale price maintenance does not appear to be the protection of property—namely, the good will of the producer—as is popularly believed[43] and as the court indicated in the *Old Dearborn case.*[44]

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[37] Ribnik v. McBride, 277 U.S. 350 (1928); Fairmont Creamery Co. v. Minnesota, 274 U.S. 1 (1927); Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522 (1923).

[38] Other jurisdictions upheld their fair trade laws on the authority of the *Old Dearborn* case. Goldsmith v. Mead Johnson & Co., 176 Md. 682, 7 A. 2d 176 (1939); Ely Lilly Co. v. Saunders, 216 N. C. 163, 4 S.E.2d 528 (1939); Weco Products Co. v. Reed Drug Co., 225 Wis. 474, 274 N.W. 426 (1937).

[39] Liquor Store, Inc. v. Continental Distilling Corp., 40 So. 2d 371. (Fla. 1949).

[40] See note 37 *supra.*

[41] 299 U.S. 183, 192 (1936).

[42] The producer, for example, has reason to fear that reduction of the margin of profit or the losses incurred in meeting price cutting competition will cause retailers either to refuse to handle his product or to push sales of other products which have a greater margin of profit while the distributor may be fighting to maintain the life of his business. SELIGMAN AND LOVE, PRICE CUTTING AND PRICE MAINTENANCE, 183-99 (1932).

[43] SELIGMAN AND LOVE, *op. cit. supra* note 42, at 199, which intimates that since the real incentive to resale price maintenance comes from the distributor, protection of good will is not the purpose. . . . "the Fair Trade Acts are concerned not with the protection of the producer or owner of the trade mark, but with the protection of certain types of wholesale and retail distributors. Their func-

The Florida Court found that the "voluntary contract" which the fair trade law provided was only concealment for the prohibition of competition in trademarked goods.[45] This finding is supported by a Federal Trade Commission Report which said, ". . . the maintenance of retail prices at a fixed and uniform level, prior to the passage of the Tydings-Miller amendment, was against the policy of the antitrust laws, and prior to the enactment of said amendment, a contract aimed at obtaining this result was illegal. The purpose of this amendment . . . is not to legalize contracts whose object is to prevent predatory price cutting for an ulterior purpose. The Tydings-Miller amendment legalizes contracts whose object is to require all dealers to sell at not less than the resale price stipulated by contract *without reference to their individual selling costs or selling policies.*"[46] Among the arguments favoring resale price maintenance are these: (1) The producer seeks only to avoid competition with himself and other manufacturers are free to undersell and thus leave a competitive market. (2) The producer desires to protect the reputation of his product. (3) The stability of the market is lost by price cutting which threatens the reasonable profit of retailers. (4) Price cutting is a deception to the public, to lure customers into the store.[47] These and other arguments may be answered by admitting that loss-leader advertising may be used for unfair or deceptive trade purposes. However, the fair trade laws do not correct this objectionable feature of price competition since the contracts entered into pursuant to such legislation make no distinction between price competition which is economically sound in the public interest and price competition which is unfairly used in trade.[48] "In practice . . . resale price

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tion and object is not to protect the good will symbolized by the trade mark, but to alleviate the rigors of price competition between distributors." Shulman, *The Fair Trade Acts and the Law of Restrictive Agreements Affecting Chattels*, 49 YALE L. J. 607, 615 (1940). In the same vein, see GRETHER, PRICE CONTROL UNDER FAIR TRADE LEGISLATION 83 (1939).

[44] 299 U.S. 183, 192 (1936).

[45] Liquor Store v. Continental Distilling Corp., 40 So. 2d 371, 375 (Fla. 1949).

[46] (Italics added) *FTC*, REPORT ON RESALE PRICE MAINTENANCE lxiv (1945). This finding is supported by recommendations of the Antitrust Division of the United States Department of Justice and by the recommendation of the Temporary National Economic Committee, *id.* at lxiii.

Chafee, *Equitable Servitudes on Chattels*, 41 Harv. L. Rev. 945, 988 (1928).

[48] FTC, Report on Resale Price Maintenance liv (1945). " . . . in the absence of the effective government supervision in the public interest, resale price maintenance, legalized to correct abuses of extreme price competition, is subject to use as a means of effecting enhancement of prices by secret agreements and restraint of competition by coercive action on the part of interested cooperating

maintenance serves as a focal point for dealer cooperative effort to bring pressure to bear on manufacturers to place products under price maintenance at prices yielding dealer margins satisfactorily to cooperating organized dealer groups."[49] Further, because fixing of prices of a single commodity invites competitors to fix lower prices, manufacturers are not inclined to enforce a system of vertical prices unless it is known that competing manufacturers are fixing prices at known levels. They do not reach an agreement *between* manufacturers as to prices but reach the same result by making *identical* resale price agreements with their dealers.[50]

THE NORTH DAKOTA FAIR TRADE LAW

The North Dakota Fair Trade Law[51] is subject to the same objections raised in the Florida Court with reference to the Florida Act. It may well be contended that the law is beneficial to a certain class rather than the general public and therefore violates the equal protection and privilege and immunities clauses of the Fourteenth Amendment to the Federal Constitution,[52] as well as similar provisions of the North Dakota Constitution which provide that no citizen shall be granted privileges and immunities not granted to all citizens on the same terms and that life, liberty, and property shall not be denied without due process.[53] To be valid the statute must conform to state constitutional requirements, and where the legislature, in enacting measures to cope with an emergency under the police power, assumes power expressly forbidden to it, the legislation is ineffective no matter how dire the emergency.[54] Further, the North Dakota constitution provides: "Any combinations between individuals, corporations, associations, or either, having for its object the controlling of prices of any product of the soil or any article of manufacture or commerce, or of the cost of exchange or transportation, is prohibited and hereby declared unlawful and against public policy. . . ."[55]

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trade groups of manufacturers ,wholesalers, and retailers in such ways and to such an extent as to make it economically unsound and undesirable in a competitive economy." *Id.* at liv-lxiv.

[49] *Id.* at liv.

[50] *Id.* at lxii.

[51] N. D. Rev. Code (1943) c. 51-11.

[52] U. S. Const. Amend. XIV.

[53] N. D. Const. Art I, §§13, 20.

[54] Cleveringa v. Klein, 6 N.D. 514, 526, 249 N.W. 118, 124 (1933).

[55] N.D. Const. Art VII, §146.

The law may also be criticised as delegating to private persons the power to fix prices without laying down a sufficient standard and without supervision.[56] Such a delegation of power authorizes private persons to contract in restraint of trade almost at will. The price set with a presumptively friendly retailer goes uncontrolled.[57]

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## TORTS — NEGLIGENCE — LAST CLEAR CHANCE IN NORTH DAKOTA

THE STRICT rules applied to the defense of contributory negligence have been modified in nearly all jurisdictions by the doctrine of last clear chance. The doctrine is generally attributed to the celebrated English case of *Davies v. Mann*[1] in which the plaintiff negligently turned his fettered donkey onto a public highway where it was struck by the defendant. Total responsibility for the injury was placed on the defendant by the court which reasoned that "notwithstanding the previous negligence of [the] . . . plaintiff . . . at the time the injury was done, it might have been avoided by the exercise of reasonable care." The principle of last clear chance thus invoked was designed to mitigate the harsh rule of contributory negligence announced in the earlier landmark case of *Butterfield v. Forrester*.[2]

Whether the last clear chance doctrine is an exception to the common law rule of contributory negligence, or instead

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[56] *Cf.* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936); Seattle Trust Co. v. Roberge, 278 U.S. 116, 122 (1928); Eubank v. Richmond, 226 U.S. 137, 143 (1912).

[57] The Department of Justice reported. ' . . . if its Antitrust Division had sufficient men and money to examine every resale price maintenance contract . . . and to proced in every case in which the arrangement goes beyond the authorizations of the Tydings-Miller amendment, there would be practically no resale price maintenance contracts, and that, in the absence of such wholesale law enforcement, the system of resale price legislation fosters restraints of trade such as Congress never intended to sanction." FTC, REPORT ON RESALE PRICE MAINTENANCE lxi (1945).

[1] 10 M. & W. 546, 152 Eng. Rep. 588 (1842). Analysis of the case is found in Schofield, *Davies v. Mann; Theory of Contributory Negligence*, 3 HARV. L. REV. 263 (1890). Comprehensive annotations on Last Clear Chance are found in 119 A. L. R. 1037 and 71 A.L.R. 365.

[2] 11 East 60, 103 Eng. Rep. 926 (1809). Criticism of the contributory negligence rule is sharply made in *Malone, Comparative Negligence*, 6 LA. L. REV. 125 (1945) and 82 CENT. L. J. 173 (1916).